No. 75-451

FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

MORRIS I. COHEN, PETITIONER

v.

ANCHOR HOCKING GLASS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-451

MORRIS I. COHEN, PETITIONER

v.

ANCHOR HOCKING GLASS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner was an investigator with the Wage and Hour Division of the Department of Labor from March 1944 through September 1963. On February 5, 1969, petitioner was deposed by respondent Anchor Hocking Glass Corporation in connection with a pending civil action filed by the Secretary of Labor under the Fair Labor Standards Act. *Wirtz* v. *Anchor Hocking Glass Corp.*, Cause No. IP-67-C-140 (S.D.

Ind.). The deposition concerned a wage and hour investigation of Anchor Hocking conducted by petitioner in 1957 (R. 176-275).[1] Petitioner requested the permission of John Secaras, Deputy Regional Solicitor for the Department of Labor, to review his investigation file for the purpose of refreshing his recollection of the investigation, and respondent Grant, Regional Solicitor for the Department of Labor, authorized petitioner's examination of the file (R. 73-76). On April 24, 1969, the suit against Anchor Hocking was settled and voluntarily dismissed. Consequently, petitioner's deposition was never introduced into evidence (Tr. 153; Pet. 8-9).

On April 21, 1972, petitioner filed a complaint in the United States District Court for the Southern District of Indiana alleging that he was defamed as a result of the taking of the February 5, 1969, deposition, which, he claimed, "imput[ed] that he was lying under oath." Petitioner further alleged that respondent Grant had joined with respondents Anchor Hocking and Powell & Oakes[2] in a "civil conspiracy to defame" him; petitioner asserted that Grant had granted "permission to read [the] investigation report * * * specifically to entrap [petitioner] by refreshing his memory" (R. 7, 8). The complaint alleged that "Herman Grant, defendant, is Regional Attorney for the United States Department of Labor * * * and jurisdiction is based on a federal question and federal statutes" (R. 6). Federal question jurisdiction was asserted under the Federal Tort Claims Act; 28 U.S.C. 1651; 28 U.S.C. 753; Rules 30 and 45 of the Federal Rules of Civil Procedure; and the Due Process Clause of the Fifth Amendment.

Grant moved to dismiss the action against him and submitted affidavits showing that his only dealings with petitioner were in his official capacity as a government attorney (R. 66-67).[3] The other defendants also filed motions to dismiss. After hearing argument and considering the parties' briefs and affidavits, the district court granted all the defendants' motions to dismiss on the ground that the action was barred by the statute of limitations (Pet. App., part 3).

The court of appeals affirmed on a different ground (Pet. App., part 2). It held that the district court lacked subject matter jurisdiction because petitioner had failed to establish complete diversity of citizenship among the parties and because the complaint

---

[1] "R." refers to the certified record in the court of appeals, which has been lodged with the Clerk of this Court. "Tr." refers to the transcript of the October 15, 1973, hearing in the district court.

[2] Respondent Anchor Hocking is a Delaware corporation. Respondent Powell & Oakes is an Indiana corporation that furnishes reporters for the taking of depositions. Petitioner is apparently alleging that they conspired (along with respondent Grant) to defame him by, respectively: (1) requesting that petitioner be deposed in connection with *Wirtz* v. *Anchor Hocking*, *supra*, and (2) falsifying or altering the deposition and then publishing it without submitting it to him for approval (R. 6-11).

[3] Since respondent Grant's motion was accompanied by affidavits, it was properly treated as a motion for summary judgment. Rule 12(c), Fed. R. Civ. P.

presented no "real and substantial controversy respecting a federal question" (Pet. App. 8).

We rely on the opinion of the court of appeals and its memorandum on petition for rehearing (Pet. App., part 1), which demonstrate that the district court lacked jurisdiction over the subject matter of this action.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

---

[4] We note that the action was properly dismissed with respect to respondent Grant for the additional reason that his discretionary approval of petitioner's request to examine the investigation file—the sole basis for his alleged participation in a "conspiracy to defame"—was given in the course of his official duties as Regional Solicitor for the Department of Labor. Petitioner's action against Grant is therefore barred by the doctrine of official immunity. *Barr* v. *Matteo*, 360 U.S. 564. See, also, *Scheuer* v. *Rhodes*, 416 U.S. 232.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1975 599521 175